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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WDB

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9 SMITHKLINE BEECHAM CORPORATION dba
10 GLAXOSMITHKLINE

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 ROSENA PERKINS as Personal
15 Representative of MATTHEW PERKINS
16 (Deceased); ANNETTA THRASHER as
17 Personal Representative of VERNAL
18 OSENTON (Deceased); WILLIAM
19 WRIGHT as Personal Representative of
20 MARY WRIGHT (Deceased); JOAN
21 MOORE as Personal Representative of
22 DANNY MOORE (Deceased),

23 Plaintiffs,

24 v.

25 SMITHKLINE BEECHAM
26 CORPORATION dba
27 GLAXOSMITHKLINE and McKESSON
28 CORPORATION,

Defendants.

Case No.

2574
**DECLARATION OF KRISTA L.
COSNER IN SUPPORT OF NOTICE
OF REMOVAL AND REMOVAL,
UNDER 28 U.S.C. § 1441(B)
(DIVERSITY) and 28 U.S.C. § 1441(C)
(FEDERAL QUESTION) OF
DEFENDANT SMITHKLINE
BEECHAM CORPORATION dba
GLAXOSMITHKLINE**

I, KRISTA L. COSNER, declare:

1. I am an attorney admitted to practice before all courts of the State of California and am an Associate with Drinker Biddle & Reath, LLP, attorneys for SMITHKLINE BEECHAM CORPORATION dba GLAXOSMITHKLINE ("GSK") in this action. I make this Declaration based on my personal knowledge, in support of Defendant GSK's removal of *Rosena Perkins, et al. v. GlaxoSmithKline, et al.*, San

1 Francisco Superior Court Case Number CGC 08-475435, to this Court. I would and
2 could competently testify to the matters stated in this Declaration if called as a witness.

3 2. A true and accurate copy of the Complaint in this action is attached as
4 **Exhibit A.**

5 3. A true and accurate copy of the Defendant's Answer to the Complaint
6 ("Answer") in this action is attached as **Exhibit B.** The Complaint and the Answer are
7 the only state court pleadings known to Defendant to have been filed in this action.

8 4. A true and accurate copy of the Judicial Panel on Multidistrict Litigation's
9 Transfer Order, *In re Avandia Marketing, Sales Practices and Products Liability*
10 *Litigation*, MDL 1871 (E.D.P.A.) is attached as **Exhibit C.**

11 5. The Declaration of Greg Yonko In Support Notice of Removal and
12 Removal Action Under 28 U.S.C. § 1441(b) (Diversity) and 28 U.S.C. § 1441(c) (Federal
13 Question) of Defendant SmithKline Beecham Corporation dba GlaxoSmithKline filed in
14 *F.C. Mitchell, et al. v. SmithKline Beecham Corporation dba GlaxoSmithKline, et al.*
15 (incorrectly sued as GlaxoSmithKline), U.S. District Court, Eastern District of California,
16 Case No: 08-CV-00542 MCE (EFB) is attached as **Exhibit D.**

17 6. This is one of many cases that have been filed recently in both federal and
18 state courts across the country involving the prescription drug Avandia.

19 7. Plaintiffs' counsel, The Miller Firm, has filed Avandia cases in both state
20 and federal courts, but only in the cases filed in California has The Miller Firm named
21 McKesson or any distributor as a defendant.

22 8. GSK intends to seek the transfer of this action to that Multidistrict
23 Litigation, *In re Avandia Marketing, Sales Practices and Products Liability Litigation*,
24 MDL 1871, and shortly will provide the JPML with notice of this action pursuant to the
25 procedure for "tag along" actions set forth in the rules of the JPML.

26 9. GSK is, and was at the time Plaintiffs commenced this action, a corporation
27 organized under the laws of the Commonwealth of Pennsylvania with its principal place
28 of business in Philadelphia, Pennsylvania, and therefore is a citizen of Pennsylvania for

1 purposes of determining diversity.

2 10. Neither GSK nor McKesson has been served with the Complaint.

3 I declare under penalty of perjury under the laws of the United States of America that
4 the foregoing is true and correct. Executed on this 21st day of May, 2008 in San Francisco,
5 California.

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7 
8 KRISTA L. COSNER
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EXHIBIT A

IMAGED

MAY 19 2008

FILED

MAY 16 2008

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OCT 17 2008 - 9 AM

GORDON PARK-LI, Clerk

BY: William E. Bartlett
Deputy Clerk8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

SUMMONS ISSUED

10 ROSENA PERKINS AS
11 PERSONAL REPRESENTATIVE
12 OF MATTHEW PERKINS
13 (DECEASED)Case No. **CGC-08-475435**COMPLAINT FOR DAMAGES
AND DEMAND **475435**14 ANNETTA THRASHER AS
15 PERSONAL REPRESENTATIVE
16 OF VERNAL OSENTON
17 (DECEASED)

BASED ON:

18 WILLIAM WRIGHT AS
19 PERSONAL REPRESENTATIVE
20 OF MARY WRIGHT (DECEASED):

1. NEGLIGENCE
2. NEGLIGENT FAILURE TO ADEQUATELY WARN
3. NEGLIGENCE *PER SE*
4. NEGLIGENT MISREPRESENTATION
5. BREACH OF EXPRESS WARRANTY
6. BREACH OF IMPLIED WARRANTY
7. STRICT PRODUCTS LIABILITY DEFECTIVE DESIGN
8. STRICT PRODUCTS LIABILITY MANUFACTURING AND DESIGN DEFECT
9. STRICT PRODUCTS LIABILITY FAILURE TO ADEQUATELY WARN
10. FRAUDULENT MISREPRESENTATION
11. VIOLATIONS OF CALIFORNIA and UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW
12. UNJUST ENRICHMENT
13. WRONGFUL DEATH
14. SURVIVAL ACTION
15. LOSS OF CONSORTIUM
16. PUNITIVE DAMAGES

21 JOAN MOORE AS
22 PERSONAL REPRESENTATIVE
23 OF DANNY MOORE (DECEASED):

24 Plaintiffs,

25 SMITHKLINE BEECHAM
26 CORPORATION
27 d/b/a GLAXOSMITHKLINE AND
28 MCKESSON CORPORATION

29 Defendants

1
2 **COMPLAINT AND DEMAND FOR JURY TRIAL**

3 Plaintiffs, individually and as representatives of the decedents' estates, by attorneys, THE
4 MILLER FIRM, LLC, as and for the Complaint herein allege upon information and belief the
5 following:

6 **INTRODUCTION**

7 1. Plaintiffs' decedents are all individuals who have consumed Defendant
8 SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE'S drug Avandia®.

9 2. This is an action to recover damages for personal injuries sustained by the Plaintiffs'
10 decedents as the direct and proximate result of the wrongful conduct of the Defendants,
11 SMITHKLINE BEECHAM CORPORATION d/b/a GLAXOSMITHKLINE, (hereinafter referred
12 to as "GSK") and MCKESSON CORPORATION (hereinafter referred to as "McKesson") in
13 connection with the designing, developing, manufacturing, distributing, labeling, advertising,
14 marketing, promoting, and selling of the widely-used diabetes prescription drug Avandia
15 (rosiglitazone).

16 3. Defendant GSK designed, researched, manufactured, advertised, promoted,
17 marketed, sold, and/or distributed Avandia.

18 4. Defendant McKesson is a corporation whose principal place of business is San
19 Francisco, California. McKesson distributed and sold Avandia in and throughout the State of
20 California.

21 **JURISDICTION AND VENUE**

22 5. The California Superior Court has jurisdiction over this action pursuant to California
23 Constitution Article VI, Section 10, which grants the Superior Court "original jurisdiction in all

1 causes except those given by statute to other trial courts." The Statutes under which this action is
2 brought do not specify any other basis for jurisdiction.

3 6. The California Superior Court has jurisdiction over the Defendants because, based
4 on information and belief, each is a corporation and/or entity organized under the laws of the State
5 of California, a foreign corporation or association authorized to do business in California and
6 registered with the California Secretary of State or has sufficient minimum contacts in California, or
7 otherwise intentionally avails itself of the California market so as to render the exercise of
8 jurisdiction over it by the California courts consistent with traditional notions of fair play and
9 substantial justice.

10 7. Venue is proper in this Court pursuant to California Code of Civil Procedure Section
11 395 in that Defendant McKesson has its principal place of business in San Francisco.

12 8. Furthermore Defendants GSK and McKesson have purposefully availed themselves
13 of the benefits and the protections of the laws within the State of California. Defendant McKesson
14 has its principal place of business within the state. Defendants GSK and McKesson have had
15 sufficient contact such that the exercise of jurisdiction would be consistent with the traditional
16 notions of fair play and substantial justice.

17 9. Plaintiffs seek relief that is within the jurisdictional limits of the Court.

18 **PARTY PLAINTIFFS**

19 10. The Plaintiff Rosena Perkins, surviving spouse of decedent Matthew Perkins, is a
20 natural person and a resident of the State of Louisiana.

21 11. The Plaintiff Annetta Thrasher, personal representative of decedent Vernal Osenton,
22 was a natural person and a resident of the State of Kentucky at the time of decedent's death.

13. The Plaintiff Joan Moore, surviving spouse of decedent Danny Moore, was a natural person and a resident of the State of Kentucky at the time of decedent's death.

13. The Plaintiff Joan Moore, surviving spouse of decedent Danny Moore, was a natural person and a resident of the State of Kentucky at the time of decedent's death.

PARTY DEFENDANTS

14. The Defendant, SmithKline Beecham Corporation d/b/a Glaxosmithkline, is a Pennsylvania corporation which has its principal place of business at One Franklin Plaza, 200 N. 16th Street, Philadelphia, Pennsylvania 19102.

15. At all times material hereto, the Defendant, SmithKline Beecham Corporation d/b/a GlaxoSmithKline was engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling, and/or selling Avandia.

16. Defendant GSK includes any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint ventures and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives and other persons action on their behalf.

17. Plaintiffs' decedents are informed and believe, and based thereon allege, that in committing the acts alleged herein, each and every managing agent, agent, representative and/or employee of the defendant was working within the course and scope of said agency, representation and/or employment with the knowledge, consent, ratification, and authorization of the Defendant and its directors, officers and/or managing agents.

18. Upon information and belief, the Defendant, SmithKline Beecham Corporation d/b/a Glaxosmithkline, was formed as a result of the merger of pharmaceutical corporations Glaxo Wellcome, Inc., and SmithKline Beecham, Inc.

20. Defendant McKesson includes any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint ventures and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives and other persons action on their behalf.

21. Plaintiffs' decedents are informed and believe, and based thereon allege, that in committing the acts alleged herein, each and every managing agent, agent, representative and/or employee of the defendant was working within the course and scope of said agency, representation and/or employment with the knowledge, consent, ratification, and authorization of the Defendant and its directors, officers and/or managing agents.

22. At all times relevant to this action, Defendant McKesson packaged, distributed, supplied, sold, placed into the stream of commerce, labeled, described, marketed, advertised, promoted, and purported to warn or to inform users regarding the risks pertaining to, and assuaged concerns about the pharmaceutical Avandia.

BACKGROUND STATEMENT OF THE CASE

23. Type 2 diabetes is the most common form of diabetes, afflicting 18 million Americans and 200 million people worldwide. This form of diabetes occurs when the body does not make enough insulin (a hormone needed to convert sugar and other food into energy) or cannot effectively use what it manages to produce.

1 24. Avandia, created and marketed by GSK, is designed to treat persons with Type 2
2 diabetes by helping sensitize cells to insulin, thereby greatly assisting in blood-sugar control. It also
3 is combined with metformin and sold as Advandamet. Only one other drug like it, pioglitazone,
4 sold as Actos and Actoplus, made by Takeda Pharmaceuticals, is sold in the United States. In 2006,
5 Avandia represented 37% of the U.S. market for oral diabetes treatments. Thus, the U.S. market for
6 such drugs is huge, and Avandia faces only one competitor for that market.

7 25. Avandia had a total U.S. sales of \$2.2 billion in 2006, slightly less than the \$2.6
8 billion in total U.S. sales for Actos, according to IMS Health, a healthcare information company.
9 Approximately 13 million Avandia prescriptions were filled in the U.S. last year, with a one-month
10 supply of Avandia selling for between \$90 and \$170. Avandia is critical to GSK, being the
11 company's second largest selling drug after Advair (an asthma medication).

12 26. GSK's product Avandia can cause heart injury, excessive fluid retention, fluid-
13 overload disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac
14 arrest and death. In 2005, GSK performed an overview analysis of multiple Avandia trials, referred
15 to as a "meta-analysis", and shared the preliminary results with the Food and Drug Administration
16 ("FDA") in September 2005. Almost one year later, in August 2006, a more complete version of
17 the meta-analysis was provided to the FDA. The results of GSK's analysis showed that patients
18 taking Avandia had a 31% higher risk of adverse cardiovascular events such as heart attack due to
19 obstruction of blood flow.

20 27. GSK's Avandia can cause heart injury, excessive fluid retention, fluid-overload
21 disease, liver damage, liver failure, stroke, and severe injury to the heart leading to cardiac arrest
22 and death. Not only was GSK aware of the dangers posed by Avandia, but data from these studies
23 continued to be made available to GSK. On May 21, 2007, Dr. Steven E. Nissen, a prominent

1 cardiologist associated with the Cleveland Clinic, published a study in the New England Journal of
2 Medicine of his analysis of 42 studies comprising of approximately 28,000 people who took
3 Avandia. These were on-line databases of GSK studies that were available on the Internet. Dr.
4 Nissen's meta-analysis revealed a 43% higher risk of heart attack for those taking Avandia
5 compared to people taking other diabetes drugs or no diabetes medication, and people taking
6 Avandia suffered such adverse events at a rate of 1.99%, as opposed to 1.51% for other patients.
7 Further, Dr. Nissen's analysis showed a 64% elevated risk of death from cardiovascular disease.

8 28. Despite GSK's longstanding knowledge of these dangers, Avandia's label only
9 warns about possible heart failure and other heart problems when taken with insulin. GSK failed to
10 adequately warn and disclose to consumers that Avandia significantly increased the risk of adverse
11 cardiovascular events. Furthermore, the proper and effective use of Avandia by Plaintiffs'
12 decedents was impaired due to GSK's failure to adequately warn of Avandia's defects and GSK's
13 failure to properly and adequately set forth such warnings in Avandia's drug labeling.

14 29. GSK knew of these dangerous defects in Avandia from the many trials which it
15 performed and to which it had access and from its own analysis of these studies, but took no action
16 to adequately warn or remedy the defects, but instead concealed, suppressed and failed to disclose
17 these dangers. Even in the face of Dr. Nissen's study, GSK continues to fail to warn of these
18 dangers through revised drug labeling.

19 30. Not only has GSK failed to disclose in its labeling or advertising that Avandia is
20 actually dangerous for diabetics, GSK has represented and has continued to represent that they
21 manufacture and/or sell safe and dependable pharmaceuticals with safety as their first concern:

22 Like all innovative pharmaceutical companies, we carry out a series of clinical trials to test
23 each investigational drug for the potential to become a new medicine.

24 ***
25

1 Phase I trials typically involve health volunteers. *These trials study the safety of the drug*
2 *and its interaction with the body*, for example, its concentration and duration in the blood following
3 various doses, and begin to answer such questions as whether the drug inhibits or amplifies the
4 effects of other medicines that might be taken at the same time.

5
6 Phase II studies enroll patients with the illness an investigational drug is designed to treat.
7 These trials evaluate whether the drug shows favorable effects in treating an illness and seek to
8 determine the proper dose. They provide an opportunity to explore the therapeutic potential of the
9 drug in what may be quite different illnesses. *The evaluation of safety continues.*

10
11 If Phase II results have been encouraging, Phase III trials, the largest part of a clinical-
12 development program, go forward. *Phase III trials are designed to provide the substantial evidence*
13 *of efficacy and safety required*, in addition to data from earlier-phase trials, before regulatory
14 agencies will approve the investigational drug as a medicine and allow it to be marketed.

15
16 <http://www.gsk.com/research/clinical/index/html> (emphasis supplied).

17
18 31. GSK has also strongly touted their commitment to improving the quality of life: "We
19 have a challenging and inspiring mission: to improve the quality of human life by enabling people
20 to do more, feel better and live longer." <http://www.gsk.com/about/index.htm>.

21 32. On May 21, 2007, the FDA issued a Safety Alert on Avandia showing that there is a
22 potentially significant risk of heart attack and heart-related deaths in patients taking Avandia.

23 33. Based on these representations, upon which both Plaintiffs' decedents and Plaintiffs'
24 decedents' prescribing physicians relied, including the omission from the Avandia labeling of the
25 danger of increased risk of adverse cardiovascular events as a result of ingesting Avandia,
26 Plaintiffs' decedents purchased and ingested Avandia believing that the drug would be safe and
27 effective.

28 34. In fact, however, Avandia poses significant safety risks due to defects in its chemical
29 design and inadequate labeling.

30 35. To date, GSK has failed to adequately warn or inform consumers, such as Plaintiffs'
31 decedents or Plaintiffs' decedents' prescribing physicians, of the known defects in Avandia that can

1 lead to increased risks of cardiovascular events, including but not limited to heart injury, excessive
2 fluid retention, fluid-overload disease, liver damage, liver failure, stroke and severe injury to the
3 heart leading to cardiac arrest, and death.

4 36. As a result of GSK's omissions and/or misrepresentations, Plaintiffs' decedents and
5 other consumers ingested Avandia, and have suffered heart injury, excessive fluid retention, fluid-
6 overload disease, liver damage, liver failure, stroke, and severe injury to the heart leading to cardiac
7 arrest and sustained physical and financial damages including pain and suffering.

8 37. Plaintiff Matthew Perkins (deceased) ingested Avandia for approximately (3) years
9 until his death. Plaintiff Matthew Perkins died on May 17, 2007. Said cause of death was a heart
10 attack.

11 38. Plaintiff Vernal Osenton (deceased) ingested Avandia for approximately (3) months
12 until his death. Plaintiff Vernal Osenton died on July 8, 2007. Said cause of death was a heart
13 attack.

14 39. Plaintiff Mary Wright (deceased) ingested Avandia. Plaintiff Mary Wright died on
15 May 31, 2007. Said cause of death was heart failure and advance renal failure.

16 40. Plaintiff Danny Moore (deceased) ingested Avandia for approximately (3) years until
17 his death. Plaintiff Danny Moore died on January 16, 2008. Said cause of death was a heart attack.

18 **COUNT I**
19 **NEGLIGENCE**

20 (Against Defendants GSK and McKesson)

21
22 41. Plaintiffs repeat and reiterate the allegations previously set forth herein.

23
24 42. That at all times hereinafter mentioned, Defendants were under a duty to exercise
25 reasonable care in the design manufacture, testing processing, marketing advertising, labeling,

1 packaging distribution, and sale of Avandia, and Defendants knew or should have known that
2 Avandia was not safe and that the user could sustain injuries and harm from the drug.

3 43. That Defendants GSK and McKesson negligently, recklessly, grossly negligently,
4 wantonly and willfully displayed a morally culpable and conscious disregard of the rights of others
5 in that they failed to exercise reasonable care and failed to fulfill the above-stated duty by the
6 manner that Defendants, directly and indirectly, advertised, marketed and promoted Avandia for the
7 treatment of diabetes, even though Avandia, in fact, was not reasonably safe for such use, and
8 furthermore, Defendants failed to adequately warn of the increased risk of serious cardiovascular
9 events which Defendants knew or should have known about.

10 44. That Defendants GSK and McKesson negligently, recklessly, grossly negligently,
11 wantonly and willfully displayed a morally culpable and conscious disregard of the rights of others
12 by manufacturing, distributing, selling, advertising, marketing and promoting Avandia even though
13 such drug was not safe or effective for any purpose because it caused serious cardiovascular events
14 and by failing to adequately warn the trusting public and prescribing health care providers of the
15 true, complete, and accurate risk and the lack of efficacy of Avandia.

16 45. The aforesaid incident and the injuries sustained by Plaintiffs' decedents were
17 caused by or were contributed to by the negligence, recklessness, gross negligence, wantonness,
18 willfulness, and conscious and callous disregard of the safety of the public, including Plaintiffs'
19 decedents, on the part of Defendants in the design, manufacture, distribution, advertising, marketing
20 and promoting of Avandia as being safe and effective in the treatment of diabetes, and by inducing
21 the public, including Plaintiffs' decedents and Plaintiffs' decedents' prescribing physicians, to
22 believe that Avandia was effective in the treatment of the causes and symptoms of diabetes.

1 46. Defendants GSK and McKesson failed to exercise reasonable care in the design,
2 manufacture, testing, processing, marketing, advertising, labeling, packaging, rebranding,
3 distribution and/or sale of Avandia in one or more of the following respects:

- 4 a. Designing, marketing, processing, advertising, packaging, distributing and/or selling a
5 product that defendants knew, or should have known, carried the risk of serious, life-
6 threatening side effects;
7
8 b. Failure to adequately test the product prior to placing the drug Avandia on the market;
9
10 c. Failure to use care in designing, developing and manufacturing their product so as to
11 avoid posing unnecessary health risks to users of such product;
12
13 d. Failure to conduct adequate pre-clinical testing and post-marketing surveillance to
14 determine the safety of Avandia;
15
16 e. Failure to advise consumers, such as Plaintiffs, that consumption of Avandia could result
17 in severe and disabling side effects, including but not limited to heart injury, excessive
18 fluid retention, fluid-overload disease, liver damage, liver failure and severe injury to the
19 heart leading to cardiac arrest and death.
20
21 f. Failure to advise the medical and scientific communities of the potential for severe and
22 disabling side effects, including but not limited to heart injury, excessive fluid retention,
23 fluid-overload disease, liver damage, liver failure, and severe injury to the heart leading
24 to cardiac arrest, and death.
25
26 g. Failure to provide timely and/or adequate warnings about the potential health risks
27 associated with the use of Avandia; and
28
29 h. Any and all other acts of negligence with respect to Avandia which may be shown at
30 trial.
31

32 47. That at all times hereinafter mentioned, upon information and belief, the above-
33 described culpable conduct by Defendants GSK and McKesson was a proximate cause of injuries
34 sustained by Plaintiffs' decedents.

35 48. That as a result of the aforesaid occurrence, the injuries sustained by Plaintiffs'
36 decedents resulting therefrom, Plaintiffs' decedents suffered extensive monetary and pecuniary
37 losses and other compensatory damages were also incurred and paid out including necessary

1 medical, hospital, and concomitant expenses. In addition, Plaintiffs' decedents were deprived of a
2 chance for safe and effective and/or successful treatment.

3 49. By reason of the foregoing, Plaintiffs' decedents sustained damages in a sum which
4 exceeds the jurisdictional limits of all lower courts which would have jurisdiction of this matter, and
5 in addition, Plaintiffs seek punitive and exemplary damages against Defendants in an amount to be
6 determined upon the trial of this matter.

7 50. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
8 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
9 relief as the Court deems proper.

10 **COUNT II**
11 **NEGLIGENT FAILURE TO ADEQUATELY WARN**
12 **(Against Defendants GSK and McKesson)**

13 51. Plaintiffs repeat and reiterate the allegations previously set forth herein.

14 52. At all relevant times, defendants GSK and McKesson researched, developed,
15 designed, tested, manufactured, inspected, labeled, and/or distributed, marketed, promoted, sold,
16 and otherwise released into the stream of commerce the pharmaceutical, Avandia, and in the course
17 of same, directly advertised or marketed the product to FDA, consumers or persons responsible for
18 consumers, and therefore had a duty to warn of the risks associated with the use of Avandia.

19 53. At all relevant times, Avandia was under the exclusive control of the Defendants as
20 aforesaid, and was unaccompanied by appropriate warnings regarding all possible adverse side
21 effects and complications associated with the use of Avandia, dangerous drug-drug interactions and
22 food-drug interactions, and the comparative severity, duration and the extent of the risk of injury
23 with such use.
24

1 54. At all relevant times, defendants failed to timely and reasonably warn of material
2 facts regarding the safety and efficacy of Avandia so that no reasonable medical care provider
3 would have prescribed, or no consumer would have used, Avandia had those facts been made
4 known to such providers and consumers.

5 55. At all relevant times, defendants failed to perform or otherwise facilitate adequate
6 testing in that such testing would have shown that Avandia posed serious and potentially life-
7 threatening side effects and complications with respect to which full and proper warning accurately
8 and fully reflecting the symptoms, scope and severity should have been made to medical care
9 providers, the FDA and the public, including Plaintiffs' decedents.

10 56. At all relevant times, Avandia, which was researched, developed, designed, tested,
11 manufactured, inspected, labeled, distributed, marketed, promoted, sold, and otherwise released into
12 the stream of commerce by Defendants, was defective due to inadequate post-marketing warning
13 and/or instruction because, after Defendants knew or should have known of the risk of serious and
14 potentially life-threatening side effects and complications from the use of Avandia, Defendants
15 failed to provide adequate warnings to medical care providers, the FDA and the consuming public,
16 including Plaintiffs, and continued to promote Avandia aggressively.

17 57. As a direct and proximate result of Defendants' carelessness and negligence, the
18 Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents
19 endured substantial pain and suffering and underwent extensive medical and surgical procedures.
20 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'
21 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have
22 suffered economic loss, and have otherwise been physically, emotionally and economically injured.

1 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs
2 seek actual and punitive damages from the Defendants as alleged herein.

3 58. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
4 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
5 relief as the Court deems proper.

6 **COUNT III**
7 **NEGLIGENCE PER SE**
8 (Against Defendants GSK and McKesson)
9

10 59. Plaintiffs repeat and reiterate the allegations previously set forth herein.

11 60. At all times mentioned herein, Defendants GSK and McKesson had an obligation not
12 to violate the law, in the manufacture, design, formulation, compounding, testing, production,
13 processing, assembling, inspection, research, distribution, marketing, labeling, packaging
14 preparation for use, sale and warning of the risks and dangers of the aforementioned product.

15 61. At all times herein mentioned, Defendants violated the Federal Food, Drug and
16 Cosmetic Act, 21 U.S.C. Section 301 *et seq.*, related amendments and codes and federal regulations
17 provided thereunder, and other applicable laws, statutes and regulations.

18 62. Plaintiffs' decedents, as purchasers and consumers of the product, are within the
19 class of persons the statutes and regulations described above are designed to protect, and the injuries
20 alleged herein are the type of harm these statutes are designed to prevent.

21 63. Defendants' acts constitute an adulteration and/or misunderstanding as defined by
22 the Federal Food, Drug and Cosmetics Act, 21 U.S.C. § 331, and constitutes a breach of duty
23 subjecting Defendants to civil liability for all damages arising therefrom, under theories of
24 negligence *per se*.

65. As a direct and proximate result of Defendants' carelessness and negligence, the Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents endured substantial pain and suffering and underwent extensive medical and surgical procedures. Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs' decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered economic loss, and have otherwise been physically, emotionally and economically injured. The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs seek actual and punitive damages from the Defendants as alleged herein.

66. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other relief as the Court deems proper.

COUNT IV
NEGLIGENT MISREPRESENTATION
(Against Defendants GSK and McKesson)

67. Plaintiffs repeat and reiterate the allegations previously set forth herein.

1 68. Defendants GSK and McKesson, in addition to knowing misrepresentations, made
2 misrepresentations without any reasonable grounds for believing its statements to be true to
3 Plaintiffs' decedents, other patients, and the medical community.

4 69. Defendants GSK and McKesson, through their misrepresentations, intended to
5 induce justifiable reliance by Plaintiffs' decedents, other patients, and the medical community.

6 70. Defendants GSK and McKesson, through their marketing campaign and
7 communications with treating physicians, were in a relationship so close to that of Plaintiffs'
8 decedents and other patients that it approaches and resembles privity.

9 71. Defendants GSK and McKesson owed a duty to the medical community, Plaintiffs'
10 decedents, and other consumers, to conduct appropriate and adequate studies and tests for all
11 products, including Avandia, and to provide appropriate and adequate information and warnings.

12 72. Defendants failed to conduct appropriate or adequate studies for Avandia.

13 73. Defendants failed to exercise reasonable care by failing to conduct studies and tests
14 of Avandia.

15 74. As a direct and proximate result of Defendants' carelessness and negligence, the
16 Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents
17 endured substantial pain and suffering and underwent extensive medical and surgical procedures.
18 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'
19 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have
20 suffered economic loss, and have otherwise been physically, emotionally and economically injured.
21 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs
22 seek actual and punitive damages from the Defendants as alleged herein.

75. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other relief as the Court deems proper.

COUNT V
BREACH OF EXPRESS WARRANTY
(Against Defendants GSK and McKesson)

76. Plaintiffs repeat and reiterate the allegations previously set forth herein.

77. Defendants GSK and McKesson expressly represented to Plaintiffs' decedents and other consumers and the medical community that Avandia was safe and fit for its intended purposes, that is was of merchantable quality, that it did not produce any dangerous side effects, and that it was adequately tested.

78. Avandia does not conform to Defendants' express representations because it is not safe, has numerous and serious side effects, and causes severe and permanent injuries.

79. At all relevant times Avandia did not perform as safely as an ordinary consumer would expect, when used as intended or in a reasonably foreseeable manner.

80. Plaintiffs' decedents, other consumers, and the medical community relied upon Defendants' express warranties.

81. As a direct and proximate result of Defendants' breach of express warranty, the Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents endured substantial pain and suffering and underwent extensive medical and surgical procedures. Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs' decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered economic loss, and have otherwise been physically, emotionally and economically injured.

1 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs
2 seek actual and punitive damages from the Defendants as alleged herein.

3 82. Defendants' conduct as described above was committed with knowing, conscious,
4 wanton, willful, and deliberate disregard for the value of human life and the rights and safety of
5 consumers such as Plaintiffs' decedents, thereby entitling Plaintiffs to punitive damages so as to
6 punish them and deter it from similar conduct in the future.

7 83. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
8 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
9 relief as the Court deems proper.

10 **COUNT VI**
11 **BREACH OF IMPLIED WARRANTY**
12 **(Against Defendants GSK and McKesson)**
13

14 84. Plaintiffs repeat and reiterate the allegations previously set forth herein.

15 85. The Defendants GSK and McKesson marketed, distributed, supplied and sold the
16 subject product for the treatment of diabetes.

17 86. At the time that the Defendants GSK and McKesson marketed, distributed, supplied,
18 and sold Avandia, they knew of the use for which the subject product was intended and impliedly
19 warranted it to be of merchantable quality and safe and fit for such use.

20 87. The Plaintiffs' decedents, individually and through prescribing physicians,
21 reasonably relied upon the skill, superior knowledge and judgment of the Defendants.

22 88. The Plaintiffs' decedents were prescribed, purchased, and used the subject product
23 for its intended purpose.

89. Due to Defendants' wrongful conduct as alleged herein, the Plaintiffs' decedents could not have known about the nature of the risks and side effects associated with the subject product until after use.

90. Contrary to the implied warranty for the subject product, Avandia was not of merchantable quality, and was not safe or fit for its intended uses and purposes as alleged herein.

91. As a direct and proximate result of Defendants' breach of implied warranty, the Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents endured substantial pain and suffering and underwent extensive medical and surgical procedures. Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs' decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered economic loss, and have otherwise been physically, emotionally and economically injured. The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs seek actual and punitive damages from the Defendants as alleged herein.

92. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other relief as the Court deems proper.

COUNT VII

STRICT PRODUCTS LIABILITY - DEFECTIVE DESIGN

(Against Defendants GSK and McKesson)

93. Plaintiffs repeat and reiterate the allegations previously set forth herein.

94. At all times material to this action, the Defendants were responsible for designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling, and/or selling Avandia.

95. The subject product is defective and unreasonably dangerous to consumers.

1 96. Avandia is defective in its design or formulation in that it is not reasonably fit,
2 suitable, or safe for its intended purpose and/or its foreseeable risks exceed the benefits associated
3 with its design and formulation.

4 97. At all times material to this action, Avandia was expected to reach, and did reach,
5 consumers in this jurisdiction and through the United States, including the Plaintiffs' decedents
6 herein, without substantial change in the condition in which it was sold.

7 98. At all times material to this action, Avandia was designed, developed, manufactured,
8 tested, packaged, promoted, marketed, distributed, labeled, and/or sold by Defendants in a defective
9 and unreasonably dangerous condition at the time it was placed in the stream of commerce in ways
10 which include, but are not limited to, one or more of the following particulars:

11 a. When placed in the stream of commerce, Avandia contained unreasonably dangerous
12 design defects and was not reasonably safe as intended to be used, subjecting the Plaintiffs'
13 decedents to risks that exceeded the benefits of the subject product, including but not limited to the
14 risks of developing heart injury, excessive fluid retention, fluid-overload disease, liver damage,
15 liver failure, stroke and severe injury to the heart leading to cardiac arrest and death and other
16 serious injuries and side effects in an unacceptably high number of its users;

17 b. When placed in the stream of commerce, Avandia was defective in design and
18 formulation, making the use of Avandia more dangerous than an ordinary consumer would expect,
19 and more dangerous than other risks associated with the other medications and similar drugs on the
20 market for the treatment of diabetes;

21 c. The subject product's design defects existed before it left the control of the Defendants;

22 d. Avandia was insufficiently tested;

23 e. Avandia caused harmful side effects that outweighed any potential utility; and

99. In addition, at the time the subject product left the control of the Defendants, there were practical and feasible alternative designs that would have prevented and/or significantly reduced the risk of Plaintiffs' decedents' injuries without impairing the reasonably anticipated or intended function of the product. These safer alternative designs were economically and technologically feasible, and would have prevented or significantly reduced the risk of Plaintiffs' decedents' injuries without substantially impairing the product's utility.

100. As a direct and proximate result of the subject product's defective design, the Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents endured substantial pain and suffering and underwent extensive medical and surgical procedures. Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs' decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered economic loss, and have otherwise been physically, emotionally and economically injured. The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs seek actual and punitive damages from the Defendants as alleged herein.

101. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other relief as the Court deems proper.

COUNT VIII
STRICT PRODUCTS LIABILITY – MANUFACTURING AND DESIGN DEFECT
(Against Defendants GSK and McKesson)

1 102. Plaintiffs repeat and reiterate the allegations previously set forth herein.

2 103. At all times material to this action, Defendants were engaged in the business of
3 designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing,
4 labeling, and/or selling Avandia.

5 104. At all times material to this action, Avandia was expected to reach, and did reach,
6 consumers in this jurisdiction and throughout the United States, including the Plaintiffs herein
7 without substantial change in the condition in which it was sold.

8 105. At all times material to this action, Avandia was designed, developed, manufactured,
9 tested, packaged, promoted, marketed, distributed, labeled, and/or sold by Defendants in a defective
10 and unreasonably dangerous condition at the time it was placed in the stream of commerce in ways
11 which include, but are not limited to, one or more of the following particulars:

12 a. When placed in the stream of commerce, Avandia contained manufacturing defects
13 which rendered the product unreasonably dangerous;

14 b. The subject product's manufacturing defects occurred while the product was in the
15 possession and control of the Defendants;

16 c. The subject product was not made in accordance with the Defendants' specifications and
17 performance standards;

18 d. The subject product's manufacturing defects existed before it left the control of the
19 Defendants;

20 106. As a direct and proximate result of the subject product's manufacturing defects, the
21 Plaintiffs' decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents
22 endured substantial pain and suffering and underwent extensive medical and surgical procedures.
23 Plaintiffs' decedents incurred significant expenses for medical care and treatment. Plaintiffs'

1 decedents have lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have
2 suffered economic loss, and have otherwise been physically, emotionally and economically injured.
3 The Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs
4 seek actual and punitive damages from the Defendants as alleged herein.

5 107. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
6 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
7 relief as the Court deems proper.

8 **COUNT IX**
9 **STRICT PRODUCTS LIABILITY – FAILURE TO ADEQUATELY WARN**
10 **(Against Defendants GSK and McKesson)**

11
12 108. Plaintiffs repeat and reiterate the allegations previously set forth herein.

13 109. Avandia was defective and unreasonably dangerous when it left the possession of the
14 Defendants in that it contained warnings insufficient to alert consumers, including the Plaintiffs'
15 decedents herein, of the dangerous risks and reactions associated with the subject product, including
16 but not limited to its propensity to cause heart injury, excessive fluid retention, fluid-overload
17 disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac arrest and
18 death and other serious injuries and side effects over other forms of diabetes treatment.

19 110. The Plaintiffs' decedents were prescribed and used the subject product for its
20 intended purpose.

21 111. The Plaintiffs' decedents could not have discovered any defect in the subject product
22 through the exercise of reasonable care.

23 112. The Defendants GSK and McKesson, as manufacturers and/or distributors of the
24 subject prescription product, are held to the level of knowledge of an expert in the field.

1 113. The warnings that were given by the Defendants GSK and McKesson were not
2 accurate, clear and/or were ambiguous.

3 114. The warnings that were given by the Defendants GSK and McKesson failed to
4 properly warn physicians of the increased risks of heart injury, excessive fluid retention, fluid-
5 overload disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac
6 arrest and death and other serious injuries and side effects.

7 115. The warnings that were given by the Defendants GSK and McKesson failed to
8 properly warn consumers of the increased risks of heart injury, excessive fluid retention, fluid-
9 overload disease, liver damage, liver failure, stroke and severe injury to the heart leading to cardiac
10 arrest and death and other serious injuries and side effects.

11 116. The Plaintiffs' decedents, individually and through prescribing physicians,
12 reasonably relied upon the skill, superior knowledge and judgment of the Defendants.

13 117. The Defendants GSK and McKesson had a continuing duty to adequately warn the
14 Plaintiffs' decedents of the dangers associated with the subject product and of the poor efficacy of
15 the product.

16 118. Had the Plaintiffs' decedents and/or Plaintiffs' decedents' prescribing physicians
17 received adequate warnings regarding the risks, and the lack of benefits, of the subject product,
18 Plaintiffs' decedents would not have used it.

19 119. As a proximate result of the subject product's manufacturing defects, the Plaintiffs'
20 decedents suffered severe and permanent physical injuries. The Plaintiffs' decedents endured
21 substantial pain and suffering and underwent extensive medical and surgical procedures. Plaintiffs'
22 decedents incurred significant expenses for medical care and treatment. Plaintiffs' decedents have
23 lost past earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered

1 economic loss, and have otherwise been physically, emotionally and economically injured. The
2 Plaintiffs' injuries and damages are permanent and will continue into the future. The Plaintiffs seek
3 actual and punitive damages from the Defendants as alleged herein.

4 120. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
5 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
6 relief as the Court deems proper.

7 **COUNT X**
8 **FRAUDULENT MISREPRESENTATION**
9 (Against Defendants GSK and McKesson)

10 121. Plaintiffs repeat and reiterate the allegations previously set forth herein.

11 122. Defendants GSK and McKesson widely advertised and promoted Avandia as a safe
12 and effective medication both in direct-to-consumer marketing and in fraudulent promotion to the
13 health care providers including Plaintiffs' decedents prescribing physicians.

14 123. Defendants GSK and McKesson had a duty to disclose material information about
15 serious side effects to consumers such as Plaintiffs. Additionally by virtue of Defendants' partial
16 disclosures about the medication, in which Defendants touted Avandia as safe and effective
17 treatment, Defendants had a duty to disclose all facts about the risks of use associated with the
18 medication, including the potential for the medication to cause heart injury, excessive fluid
19 retention, fluid-overload disease, liver damage, liver failure, stroke and severe injury to the heart
20 leading to cardiac arrest, and death. Defendants intentionally failed to adequately disclose this
21 information for the purpose of inducing consumers, such as Plaintiffs' decedents, to purchase
22 Defendants' dangerous product.
23

1 124. Had Plaintiffs been aware of the hazards associated with Avandia, Plaintiffs'
2 decedents would not have consumed the product that lead proximately to Plaintiffs' decedents'
3 adverse health effects.

4 125. Defendants' advertisements regarding Avandia made material misrepresentations to
5 the effect that Avandia was a safe and effective treatment, which misrepresentations Defendant
6 knew to be false, for the purpose of fraudulently inducing consumers, such as Plaintiffs' decedents,
7 to purchase such product. Plaintiffs' decedents relied in part on these material misrepresentations in
8 deciding to purchase and consume Avandia to their detriment.

9 126. The damages sustained by Plaintiffs' decedents were a direct and foreseeable result
10 of, and were proximately caused by Defendants' misrepresentations, concealment and omissions.

11 127. Defendants' conduct was willful, wanton, and reckless. Based on the intentionally
12 dishonest nature of Defendants' conduct, which was directed at Plaintiffs' decedents and the public
13 generally, Defendants should also be held liable for punitive damages.

14 128. Any applicable statutes of limitation have been tolled by Defendants' knowing and
15 active concealment and denial of the facts alleged herein. Plaintiffs' decedents and other members
16 of the public who were prescribed and who ingested Avandia for the treatment of diabetes have
17 been kept in ignorance of vital information essential to the pursuit of these claims, without any fault
18 or lack of diligence on their part, and could not reasonably have discovered the fraudulent nature of
19 Defendants' conduct, and information and documents concerning the safety and efficacy of
20 Avandia. Furthermore, due to the aforesaid allegations, Plaintiffs' decedents may rely on the
21 discovery rule in pursuit of this claim.

22 129. By reason of the foregoing, Plaintiffs' decedents sustained damages in a sum which
23 exceeds the jurisdictional limits of all lower courts which would have jurisdiction of this matter, and

1 in addition thereto, Plaintiffs seek punitive and exemplary damages against Defendants in an
2 amount to be determined upon the trial of this matter.

3 130. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
4 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
5 relief as the Court deems proper.

6 **COUNT XI**
7 **VIOLATIONS OF CALIFORNIA UNFAIR TRADE PRACTICES AND CONSUMER**
8 **PROTECTION LAW**

9 (Against Defendants GSK and McKesson)

10 131. Plaintiffs repeat and reiterate the allegations previously set forth herein.

11 132. Defendants have engaged in unfair competition or unfair or deceptive acts or
12 practices in violation of Cal. Bus. & Prof. Code § 17200, et seq. and the Consumer Legal Remedies
13 Act, Civ. Code § 1750 et seq. ("CLRA")

14 133. Defendants GSK and McKesson acted, used and employed deception, unfair and
15 deceptive acts and practices, fraud, false promises, misrepresentations, concealment, suppression
16 and omission of material facts with intent that physicians and medical providers rely upon such
17 concealment, suppression and omission, and for the purpose of influencing and inducing physicians
18 and medical providers to prescribe Avandia, for the treatment of diabetes to patients/consumers
19 such as Plaintiffs' decedents, and causing such patients/consumers to purchase, acquire and use
20 Avandia for the treatment of diabetes, as prescribed by their physicians and medical providers, in
21 connection with the sale and advertisement of the drug Avandia, in violation of California law.

22 134. By reason of Defendants' acts, uses and employment of deception, unfair and
23 deceptive acts and practices, fraud, false promises, misrepresentations, concealment, suppression
24 and omission of material facts, reasonable patients/consumers acting reasonably, such as Plaintiffs'
25

1 decedents, were caused to purchase and ingest Avandia, and thereby sustain serious personal
2 injuries.

3 135. By reason of the foregoing, Plaintiffs sustained damages in a sum which exceeds the
4 jurisdictional limits of all lower courts which would have jurisdiction of this matter, and in addition
5 thereto, Plaintiffs seek punitive and exemplary damages against Defendants in an amount to be
6 determined upon the trial of this matter.

7 **COUNT XII**

8 **UNJUST ENRICHMENT**

9 (Against Defendants GSK and McKesson)

10
11 136. Plaintiffs repeat and reiterate the allegations previously set forth herein.

12 137. To the detriment of Plaintiffs' decedents the Defendants GSK and McKesson have
13 been, and continue to be, unjustly enriched as a result of the unlawful and/or wrongful collection of,
14 inter alia, payments for Avandia.

15 138. Plaintiffs' decedents were injured by the cumulative and indivisible nature of the
16 Defendants' conduct. The cumulative effect of the Defendants' conduct directed at physicians and
17 consumers was to artificially create a demand for Avandia at an artificially inflated price. Each
18 aspect of the Defendants' conduct combined to artificially create sales of Avandia.

19 139. The Defendants GSK and McKesson have unjustly benefited through the unlawful
20 and/or wrongful collection of, inter alia, payments for Avandia and continue to so benefit to the
21 detriment and at the expense of Plaintiffs.

22 140. Accordingly, Plaintiffs seek full disgorgement and restitution of the Defendants'
23 enrichment, benefits, and ill-gotten gains acquired as a result of the unlawful and/or wrongful
24 conduct alleged herein.

1 141. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
2 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
3 relief as the Court deems proper.

4 **COUNT XIII**
5 **WRONGFUL DEATH**
6 (Against Defendants GSK and McKesson)

7
8 142. Plaintiffs repeat and reiterate the allegations previously set forth herein.

9 143. As a result of the acts and/or omissions of the Defendants as set forth herein,
10 Plaintiffs' decedents suffered serious emotional and bodily injuries resulting in death.

11 144. Plaintiff Rosena Perkins, as designated personal representative of Matthew Perkins,
12 is entitled to recover damages as decedent would have if he were living, as a result of the acts
13 and/or omissions of the Defendants as specifically pled, herein pursuant to Cal. Code Civ. Proc. §
14 377.60.

15 145. Plaintiff Annetta Thrasher as designated personal representative of Vernal Osenton,
16 is entitled to recover damages as decedent would have if he were living, as a result of the acts
17 and/or omissions of the Defendants as specifically pled, herein pursuant to Cal. Code Civ. Proc. §
18 377.60.

19 146. Plaintiff William Wright as designated personal representative of Mary Wright, is
20 entitled to recover damages as decedent would have if he were living, as a result of the acts and/or
21 omissions of the Defendants as specifically pled, herein pursuant to Cal. Code Civ. Proc. § 377.60.

22 147. Plaintiff Joan Moore as designated personal representative of Danny Moore, is
23 entitled to recover damages as decedent would have if he were living, as a result of the acts and/or
24 omissions of the Defendants as specifically pled, herein pursuant to Cal. Code Civ. Proc. § 377.60.

1 148. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
2 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
3 relief as the Court deems proper.

4 **COUNT XIV**
5 **SURVIVAL ACTION**
6 (Against Defendants GSK and McKesson)

7 149. Plaintiffs repeat and reiterate the allegations previously set forth herein.

8 150. As a result of the actions and inactions of the Defendants, Plaintiffs' decedents were
9 caused harm and suffering before their death.

10 151. Plaintiffs in their own right and as personal representatives of the decedents' estates
11 seek damages compensable under Cal. Code Civ. Proc. § 377.30.

12 152. Plaintiffs are potential beneficiaries of this action as surviving heirs, making them
13 the decedents' successors in interest under Cal. Code Civ. Proc. § 377.30.

14 153. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
15 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
16 relief as the Court deems proper.

17 **COUNT XV**
18 **LOSS OF CONSORTIUM**
19 (Against Defendants GSK and McKesson)

20 154. Plaintiffs repeat and reiterate the allegations previously set forth herein.

21 155. In cases where Plaintiffs' decedents were married at the time of their respective
22 injuries, the spouses of such Plaintiffs were entitled to their comfort, care, affection,
23 companionship, services, society, advice, guidance, counsel, and consortium.

24 156. As a direct and proximate result of one or more of those wrongful acts or omissions
25 of the Defendants described above, Plaintiffs' decedents' spouses have been and will be deprived of
26

1 their comfort, care, affection, companionship, services, society, advice, guidance, counsel and
2 consortium.

3 157. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory,
4 treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other
5 relief as the Court deems proper.

6 **COUNT XVI**
7 **PUNITIVE DAMAGES**

8 (Against Defendants GSK and McKesson)

9
10 158. Plaintiffs repeat and reiterate the allegations previously set forth herein.

11 159. At all times material hereto, the Defendants GSK and McKesson knew or should
12 have known that the subject product was inherently more dangerous with respect to the risks of
13 heart injury, excessive fluid retention, fluid-overload disease, liver damage, liver failure, stroke, and
14 severe injury to the heart leading to cardiac arrest, and death than alternative treatments for
15 diabetes.

16 160. At all times material hereto, the Defendants GSK and McKesson attempted to
17 misrepresent and did misrepresent facts concerning the safety of the subject product.

18 161. Defendants' misrepresentations included knowingly withholding material
19 information from the medical community and the public, including the Plaintiffs' decedents herein,
20 concerning the safety of the subject product.

21 162. At all times material hereto, the Defendants GSK and McKesson knew and
22 recklessly disregarded the fact that Avandia causes debilitating and potentially lethal side effects
23 with greater frequency than safer alternative methods of treatment for diabetes.

24 163. Notwithstanding the foregoing, the Defendants GSK and McKesson continued to
25 aggressively market the subject product to consumers, including the Plaintiffs' decedents herein.

1 without disclosing the aforesaid side effects when there were safer alternative methods of treatment
2 for diabetes.

3 164. The Defendants GSK and McKesson knew of the subject product's defective and
4 unreasonably dangerous nature, as set forth herein, but continued to design, develop, manufacture,
5 market, distribute and sell it so as to maximize sales and profits at the expense of the health and
6 safety of the public, including the Plaintiffs' decedents herein, in conscious and/or negligent
7 disregard of the foreseeable harm caused by Avandia.

8 165. Defendants GSK and McKesson intentionally concealed and/or recklessly failed to
9 disclose to the public, including the Plaintiffs' decedents herein, the potentially life threatening side
10 effects of Avandia in order to ensure continued and increased sales.

11 166. The Defendants' intentional and/or reckless failure to disclose information deprived
12 the Plaintiffs' decedents of necessary information to enable Plaintiffs' decedents to weigh the true
13 risks of using the subject product against its benefits.

14 167. As a direct and proximate result of the Defendants' conscious and deliberate
15 disregard for the rights and safety of consumers such as the Plaintiffs, the Plaintiffs' decedents
16 suffered severe and permanent physical injuries. The Plaintiffs' decedents endured substantial pain
17 and suffering and underwent extensive medical and surgical procedures. Plaintiffs' decedents
18 incurred significant expenses for medical care and treatment. Plaintiffs' decedents have lost past
19 earnings and have suffered a loss of earning capacity. The Plaintiffs have suffered economic loss,
20 and have otherwise been physically, emotionally and economically injured. The Plaintiffs' injuries
21 and damages are permanent and will continue into the future. The Plaintiffs seek actual and
22 punitive damages from the Defendants as alleged herein.

168. The aforesaid conduct of Defendants GSK and McKesson was committed with knowing, conscious, and deliberate disregard for the rights and safety of consumers, including the Plaintiffs' decedents herein, thereby entitling the Plaintiffs to punitive damages in an amount appropriate to punish the Defendants and deter them from similar conduct in the future.

169. WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages, together with interest, costs of suit, attorneys' fees, and all such other relief as the Court deems proper.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for judgment against Defendants as follows:

- (1) Judgment for Plaintiffs and against defendants;
- (2) Damages in the form of compensatory damages in excess of the jurisdictional limits, trebled on all applicable counts;
- (3) Physical pain and suffering of the Plaintiffs
- (4) Pre and post judgment interest at the lawful rate;
- (5) Reasonably attorneys' fees and costs and expert fees;
- (6) A trial by jury on all issues of the case;
- (7) For any other relief as this court may deem equitable and just;
- (8) Restitution of all purchase costs that Plaintiffs paid for Avandia disgorgement of Defendants' profits, and such other relief as provided by law;
- (9) Exemplary and punitive damages in an amount in excess of the jurisdictional limits, trebled on all applicable counts;
- (10) All Bill of Costs elements; and
- (11) Such other relief this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all claims so triable in this action.

1 Dated: May 15, 2008

Respectfully submitted,

2
3
4 

5 David C. Andersen (Bar No. 194095)

6 THE MILLER FIRM, LLC

7 Attorneys for Plaintiffs

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13
14

EXHIBIT B

ENDORSED
FILED
Superior Court of California
County of San Francisco

MAY 21 2008

GORDON PARK-LI, Clerk
BY: MARIA SANCHEZ
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

ROSENA PERKINS as Personal
Representative of MATTHEW PERKINS
(Deceased); ANNETTA THRASHER as
Personal Representative of VERNAL
OSENTON (Deceased); WILLIAM
WRIGHT as Personal Representative of
MARY WRIGHT (Deceased); JOAN
MOORE as Personal Representative of
DANNY MOORE (Deceased),

Plaintiffs,

v.

SMITHKLINE BEECHAM
CORPORATION dba
GLAXOSMITHKLINE and McKESSON
CORPORATION,

Defendants.

Case No. CGC 08-475435

**ANSWER TO COMPLAINT BY
DEFENDANT SMITHKLINE
BEECHAM CORPORATION dba
GLAXOSMITHKLINE**

INTRODUCTION

Defendant SMITHKLINE BEECHAM CORPORATION dba
GLAXOSMITHKLINE ("GSK"), by and through counsel, hereby responds to the
allegations set forth by ROSENA PERKINS, ANNETTA THRASHER, WILLIAM
WRIGHT, and JOAN MOORE ("Plaintiffs") in THEIR Complaint for Damages (the
"Complaint") as follows:

GENERAL DENIAL

By virtue of the provisions of California Code of Civil Procedure §431.30, Defendant generally denies each and every allegation in the unverified Complaint that relates to or is directed to Defendant or any of its alleged agents, servants or employees. Defendant further denies that Plaintiffs have been damaged to any extent or amount or is entitled to any relief whatsoever from Defendant.

Defendant additionally denies that there is any law, fact, theory or contractual or legal relationship under which Plaintiffs are entitled to damages in any amount by the answering Defendant.

Defendant further alleges the following affirmative defenses to Plaintiffs' Complaint:

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Improper Venue)

Venue is improper.

SECOND AFFIRMATIVE DEFENSE

(Insufficiency of Process and Insufficiency of Service of Process)

Process and service of process are insufficient under California law.

THIRD AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

FOURTH AFFIRMATIVE DEFENSE

(Preemption/Primary Jurisdiction)

Plaintiffs' claims are barred and/or this Court should defer this matter, in whole or in part, pursuant to the doctrine of primary jurisdiction, in that the FDA is charged under the law with regulating prescription drugs, including Avandia®, and is specifically charged with determining the content of the warnings and labeling for prescription drugs.

1 The granting of the relief prayed for in the Plaintiffs' Complaint would impede, impair,
2 frustrate or burden the effectiveness of such federal law and would violate the Supremacy
3 Clause (Art. VI, cl. 2) of the United States Constitution.

4 **FIFTH AFFIRMATIVE DEFENSE**

5 **(Statute of Limitations/Repose)**

6 Discovery may show that Plaintiffs' claims are barred, in whole or in part, by
7 applicable statutes of limitations, statutes of repose, the doctrine of laches and/or as a
8 result of the failure to allege and/or comply with conditions precedent to applicable
9 periods of limitations and repose.

10 **SIXTH AFFIRMATIVE DEFENSE**

11 **(Assumption of Risk)**

12 Plaintiffs knowingly and voluntarily assumed any and all risks as to matters
13 alleged in the Complaint, and such assumption of the risk bars in whole or in part the
14 damages Plaintiffs seek to recover herein.

15 **SEVENTH AFFIRMATIVE DEFENSE**

16 **(Contributory/Comparative Negligence)**

17 At all times mentioned herein, Plaintiffs were negligent, careless, and at fault and
18 conducted themselves so as to contribute substantially to any alleged risk of injuries and
19 damages. Said negligence, carelessness and fault of Plaintiffs bars in whole or in part the
20 damages which Plaintiffs seek to recover herein.

21 **EIGHTH AFFIRMATIVE DEFENSE**

22 **(Equitable Defenses)**

23 Plaintiffs' claims are barred by the doctrine of laches, estoppel, waiver, unclean
24 hands and/or failure to preserve evidence.

25 **NINTH AFFIRMATIVE DEFENSE**

26 **(Improper Party Defendant)**

27 McKesson is not a proper party defendant to this action. McKesson was not
28 involved with Avandia[®], a product of GSK.

TENTH AFFIRMATIVE DEFENSE

(Improper Plaintiffs)

This Complaint improperly joins multiple plaintiffs.

ELEVENTH AFFIRMATIVE DEFENSE

(Intervening, Superseding Cause)

The damages allegedly sustained by Plaintiffs, if any, were not legally caused by Defendant, but instead were legally caused by intervening and superseding causes or circumstances.

TWELFTH AFFIRMATIVE DEFENSE

(Pre-existing Condition or Idiosyncratic Reaction)

The risk of injuries, if any, resulted from a pre-existing and/or related medical condition and/or idiosyncratic reaction and not from any act or omission by or on behalf of Defendant.

THIRTEENTH AFFIRMATIVE DEFENSE

(Fault of Others)

Plaintiffs' alleged injuries, losses, or damages, if any, were caused by the actions negligence, carelessness, fault, strict liability, or omissions of third parties for which Defendant has no control or responsibility.

FOURTEENTH AFFIRMATIVE DEFENSE

(Learned Intermediary)

Plaintiffs' claims are barred in whole or in part by the learned-intermediary doctrine.

FIFTEENTH AFFIRMATIVE DEFENSE

(Compliance with FDA Regulations)

At all times relevant, the product was in accordance with and pursuant to all applicable statutes and regulations, including those of the Food and Drug Administration.

1 **SIXTEENTH AFFIRMATIVE DEFENSE**

2 **(Immunity for Prescription Drugs and Medical Devices)**

3 The Complaint and each cause of action thereof are barred by the doctrine of
4 immunity for prescription drugs and medical devices, by the Commerce Clause, Article I,
5 Section 8, of the Constitution of the United States as an undue burden upon interstate
6 commerce and/or by the preemption doctrine in that Plaintiffs have asserted claims for
7 relief which, if granted, would constitute an impermissible burden by this court on federal
8 laws, regulations and policy relating to the development and marketing of prescription
9 drugs and medical devices in violation of the Supremacy Clause, Article IV, Clause 2 of
10 the Constitution of the United States.

11 **SEVENTEENTH AFFIRMATIVE DEFENSE**

12 **(Restatements of Torts)**

13 Defendant affirmatively pleads the application of the Restatement (Second) of
14 Torts: Products Liability § 402A and comments thereto, and/or the Restatement (Third)
15 of Torts: Products Liability §§ 2, 4 and 6 and comments thereto. Adequate warnings and
16 complete warnings were provided to Plaintiffs' prescribing physician, and therefore, the
17 product was not defective or unreasonably dangerous.

18 **EIGHTEENTH AFFIRMATIVE DEFENSE**

19 **(State of the Art)**

20 At all times material hereto, Defendant's conduct and GSK's product, Avandia®,
21 conformed to the state of the art.

22 **NINETEENTH AFFIRMATIVE DEFENSE**

23 **(Limitations on Punitive Damages)**

24 With respect to Plaintiffs' demand for punitive or exemplary damages, Defendant
25 specifically incorporates by reference all standards of limitations regarding the
26 determination and enforceability of punitive damages awards, including but not limited
27 to, those standards of limitation which arose in *BMW of North America v. Gore*, 517 U.S.
28 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424

(2001), and *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).

TWENTIETH AFFIRMATIVE DEFENSE

(Punitive and Exemplary Damages Not Proper)

Plaintiffs' claim for punitive damages violates, and it is therefore barred by, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States of America on grounds including the following:

a. it is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution to impose punitive damages, which are penal in nature, against a civil defendant upon the Plaintiffs satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases;

b. the procedures pursuant to which punitive damages are awarded may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing, which infringes upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

c. the procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against defendant, which thereby violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

d. the procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

e. the procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts, and thus violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

f. the procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes upon the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

g. the procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines in violation of the Eighth Amendment to the United States Constitution;

h. the award of punitive damages to Plaintiffs in this action would constitute a deprivation of property without due process of law; and

i. the procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine and penalty

TWENTY-FIRST AFFIRMATIVE DEFENSE

(No Failure to Warn)

Defendant at all times discharged any duty to warn through appropriate and adequate warnings in accordance with federal statutes and regulations and with the then-existing states of medical and scientific knowledge.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Plead Fraud with Particularity)

Plaintiffs have failed to plead a cause of action for fraud as they have not set forth allegations of fraud with the requisite particularity.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Product Safety)

At all times relevant, Avandia® was not unreasonably dangerous or defective.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary Party)

Complete relief cannot be accorded among those already parties and, in the alternative, the disposition of this action without the presence of additional, unnamed

1 persons may result in Defendant being subject to a substantial risk of incurring double,
2 multiple, or otherwise inconsistent obligations.

3 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

4 **(Set Off)**

5 Defendant pleads as a set off any monies received by Plaintiffs for injuries or
6 damages attributed to the subject incident, including, but not limited to, any insurance
7 proceeds.

8 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

9 **(Lack of Causation)**

10 Defendant asserts that its conduct did not cause, proximately cause, solely cause,
11 or solely proximately cause the injuries and/or damages alleged by Plaintiffs.

12 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

13 **(Good Faith)**

14 Defendant's acts were at all times done in good faith and without malice, with
15 respect to each and every purported cause of action in Plaintiffs' Complaint.

16 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

17 **(Unintentional Acts)**

18 Any alleged act or omission by Defendant concerning the manufacture,
19 distribution, marketing, and/or sale of Avandia® and/or any other conduct in relation
20 thereto was at all times unintentional and resulted from a bona fide error notwithstanding
21 the use of reasonable procedures adopted to avoid any such error, and Defendant made an
22 appropriate correction, repair, replacement, or remedy to the goods once notified of the
23 error.

24 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

25 **(Conformity with Medical Knowledge)**

26 With respect to each and every purported cause of action in Plaintiffs' Complaint,
27 Defendant alleges that the methods, standards, and techniques in the preparation of
28 GSK's product, Avandia®, were and are in conformity with the generally recognized

1 state of medical knowledge, common and accepted procedure in the medical field, and
2 state of the art at the time of their preparation.

3 **THIRTIETH AFFIRMATIVE DEFENSE**

4 **(Equitable Indemnity)**

5 In the event Defendant is held liable to Plaintiffs, which liability is expressly
6 denied, and any other entity is also found liable, Defendant is entitled to a percentage
7 contribution of the total liability from said entity in accordance with principles of
8 equitable indemnity and comparative contribution.

9 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

10 **(Proposition 51)**

11 The liability of Defendant, if any, for Plaintiffs' non-economic loss must be
12 apportioned in accordance with the provisions of California Civil Code § 1431.2
13 ("Proposition 51").

14 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

15 **(Failure to Mitigate Damages)**

16 Plaintiffs' damages, if any, are barred in whole or in part by Plaintiffs' failure to
17 mitigate such damages.

18 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

19 **(No Notice of Breach of Warranty)**

20 Plaintiffs failed to give notice of any alleged breach of warranty.

21 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

22 **(Disclaimer of Warranty)**

23 Defendant alleges that any and all warranties that may form a basis for Plaintiffs'
24 claims for relief were adequately disclaimed as stated by Defendant.

25 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

26 **(No Reliance on Warranties)**

27 Defendant denies that Plaintiffs relied on any warranties alleged in the Complaint.
28

THIRTY-SIXTH AFFIRMATIVE DEFENSE**(Unavoidable Circumstances)**

The alleged injuries and/or damages of Plaintiffs, if any, were the result of unavoidable circumstances that could not have been prevented by anyone.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE**(Misuse)**

If Plaintiffs sustained injuries or risk of injuries in this action, which allegations are expressly denied, the injuries or risk of injuries were solely caused by and attributable to the unintended, unreasonable, and improper use which Plaintiffs made of the product.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE**(No Strict Liability for Prescription Drugs)**

The strict liability causes of action of Plaintiffs' Complaint are subject to the limitations placed upon the doctrine of strict product liability for a purported design defect as set forth in *Brown v. Superior Court*, 44 Cal. 3d. 1049 (1988) and its progeny.

THIRTY-NINTH AFFIRMATIVE DEFENSE**(*Buckman v. Plaintiffs' Legal Community*)**

To the extent Plaintiffs' claims are based on alleged misrepresentations or omissions made to the FDA, such claims are barred pursuant to *Buckman v. Plaintiffs' Legal Community*, 531 U.S. 341 (2001).

FORTIETH AFFIRMATIVE DEFENSE**(Standing)**

Plaintiffs lack standing to bring some or all of the claims alleged in the Complaint.

FORTY-FIRST AFFIRMATIVE DEFENSE**(Unconstitutional Claims)**

Defendant alleges that granting Plaintiffs' requested relief under California Business and Professions Code § 17200 et seq. and 17500 et seq. ("BPC 17200 and 17500"), would violate Defendant's rights under the United States and California constitutions.

FORTY-SECOND AFFIRMATIVE DEFENSE**(Adequate Remedy at Law)**

Plaintiffs' causes of action under BPC 17200 and 17500, and the remedies sought there under, are barred because there is an adequate remedy at law.

FORTY-THIRD AFFIRMATIVE DEFENSE**(Unjust Enrichment)**

Any and all BPC 17200 and 17500 claims are barred, in whole or in part, on the basis that Plaintiffs would be unjustly enriched if allowed to recover damages there under.

FORTY-FOURTH AFFIRMATIVE DEFENSE**(Remedies for Third Parties Barred)**

Plaintiffs' causes of action under BPC 17200 and 17500 and the remedies sought there under, are barred because Plaintiffs seek remedies for parties that have not been injured and there are no identifiable injured parties.

FORTY-FIFTH AFFIRMATIVE DEFENSE**(Plaintiffs not Competent Party)**

Plaintiffs' causes of action under BPC 17200 and 17500 and the remedies sought thereunder, are barred because the Complaint has not been filed by competent Plaintiffs for the benefit of injured parties.

FORTY-SIXTH AFFIRMATIVE DEFENSE**(Administrative or Regulatory Schemes Bar Recovery/Abstention)**

Plaintiffs' causes of action under BPC 17200 and 17500 and the remedies sought thereunder, are barred by the existence of a comprehensive administrative or regulatory scheme which would redress the actions complained of by Plaintiffs. This Court should dismiss or stay Plaintiffs' BPC 17200 and 17500 claims in deference to this administrative or regulatory scheme.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

(Choice of Law)

- (a) Plaintiffs' claims are not governed by the laws of the State of California.
- (b) Defendant is entitled to the benefit of all defenses and presumptions contained in, or arising from, any rule of law or statute of any other state whose substantive law might control the action.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

(Other Defenses)

Defendant hereby gives notice that it intends to rely upon any other affirmative defenses pled by any other defendant and not pled by it in this action to the extent they do not conflict with Defendant's own affirmative defenses. Defendant reserves its right to amend its Answer to assert any additional defenses and matters in avoidance that may be disclosed during the course of additional investigation and discovery.

JURY DEMAND

Defendant requests a trial by jury of this matter.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays:

1. That the Complaint be dismissed with prejudice as to the answering Defendant and that judgment be entered in their favor;
2. For costs of suit incurred herein;
3. And for such other relief as the Court may deem just and appropriate.

Dated: May 21, 2008

DRINKER BIDDLE & REATH LLP


KRISTA L. COSNER

Attorneys for Defendant
SMITHKLINE BEECHAM
CORPORATION dba
GLAXOSMITHKLINE

CERTIFICATE OF SERVICE

I, LEE ANN L. ALLDRIDGE, declare that:

I am at least 18 years of age, and not a party to the above-entitled action. My business address is 50 Fremont Street, 20th Floor, San Francisco, California 94105, Telephone: (415) 591-7500.

On May 21, 2008, I caused to be served the following document(s):

ANSWER TO COMPLAINT BY DEFENDANT SMITHKLINE BEECHAM CORPORATION dba GLAXOSMITHKLINE

by enclosing a true copy of (each of) said document(s) in (an) envelope(s), addressed as follows:

- ☒ BY MAIL: I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.
- ☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by a messenger service by hand to the address(es) listed below:
- ☐ BY OVERNIGHT DELIVERY: I enclosed a true copy of said document(s) in a Federal Express envelope, addressed as follows:
- ☐ BY FACSIMILE: I caused such documents to be transmitted by facsimile transmission and mail as indicated above.

David C. Andersen
THE MILLER FIRM, LLC
108 Railroad Avenue
Orange, VA 22960
Telephone: (540) 672-4224
Facsimile: (540) 672-3055

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 21, 2008 at San Francisco, California.


LEE ANN L. ALLDRIDGE

EXHIBIT C

MDL 1871UNITED STATES
JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

7:23 am, Oct 16, 2007

FILED
CLERK'S OFFICEUNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATIONIN RE: AVANDIA MARKETING, SALES PRACTICES
AND PRODUCTS LIABILITY LITIGATIONSharon Ann Dabon v. GlaxoSmithKline, Inc.,)
E.D. Louisiana, C.A. No. 2:07-3041)
Celenio Cruz-Santana v. GlaxoSmithKline, PLC, et al.,)
D. Puerto Rico, C.A. No. 3:07-1461)

MDL No. 1871

TRANSFER ORDER

Before the entire Panel: Plaintiff in the action pending in the Eastern District of Louisiana, has moved, pursuant to 28 U.S.C. § 1407, to centralize this litigation in the District of Puerto Rico or, alternatively, in the Eastern District of Louisiana. This litigation currently consists of moving plaintiff's action and one action pending in the District of Puerto Rico.¹ Plaintiff in the latter action supports centralization in the District of Puerto Rico. Plaintiffs in potential tag-along actions pending in the Central District of California, the Southern District of Florida, the District of New Jersey, the Southern District of New York, and the District of Puerto Rico have submitted responses in support of centralization. These plaintiffs suggest a variety of fora for transferee district, including the Southern District of Florida (favored by plaintiffs in the action pending in that district), the District of New Jersey (favored by plaintiff in the action pending in that district, as well as plaintiff in the Central District of California action), the Southern District of New York (favored by plaintiffs in eight actions pending in that district), and the District of Puerto Rico (favored by plaintiffs in the action pending in that district). Responding defendant SmithKlineBeecham Corp. d/b/a GlaxoSmithKline (GSK) initially opposed the Section 1407 motion, but now supports centralization in the Eastern District of Pennsylvania.

* Judge Heyburn took no part in the disposition of this matter.

¹ The Panel has been notified of 28 additional related actions pending in the Western District of Arkansas, the Central District of California (two actions), the Southern District of Florida (two actions), the Southern District of Illinois, the Southern District of Indiana, the Eastern District of Louisiana, the District of New Jersey, the Eastern District of New York, the Southern District of New York (ten actions), the Northern District of Ohio, the Eastern District of Oklahoma, the Eastern District of Pennsylvania, the District of Puerto Rico, the Eastern District of Tennessee, the Western District of Tennessee, and the Eastern District of Texas (two actions). These actions and any other related actions will be treated as potential tag-along actions. See Rules 7.4 and 7.5, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001).

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PLEADING NO. 22

- 2 -

On the basis of the papers filed and hearing session held, we find that these actions involve common questions of fact, and that centralization under Section 1407 in the Eastern District of Pennsylvania will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Both actions arise from allegations that certain diabetes drugs manufactured by GSK – Avandia and/or two sister drugs containing Avandia (Avandamet and Avandaryl) – cause an increased risk of heart attack and other physical injury, and that GSK failed to provide adequate warnings concerning that risk. Centralization under Section 1407 will eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.

We are also persuaded that the Eastern District of Pennsylvania is an appropriate transferee district for pretrial proceedings in this litigation. GSK's principal place of business is located in that district, and thus many witnesses and documents relevant to the litigation are likely to be found there. In addition, one of the potential tag-along actions was commenced in the Eastern District of Pennsylvania.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the two actions are transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable Cynthia M. Rufe for coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



D. Lowell Jensen
Acting Chairman

John G. Heyburn II, Chairman*
Robert L. Miller, Jr.
David R. Hansen

J. Frederick Motz
Kathryn H. Vratil
Anthony J. Scirica

EXHIBIT D

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Attorneys for Defendants
SMITHKLINE BEECHAM CORPORATION dba
GLAXOSMITHKLINE and MCKESSON
CORPORATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

F.C. MITCHELL and MITSUKO
MITCHELL, husband and wife; MARY
RYON and JAMES RYON, wife and
husband; CARL HOUSTON and ALICE
HOUSTON, husband and wife; JOSEPH
WOODS, SR. and BILLIE WOODS,
husband and wife; DONALD WINTERS
and KELLEY WINTERS, husband and
wife; RAY STOCK, as surviving statutory
beneficiary for the wrongful death of
JOLENE STOCK; WILMA POLLARD, as
surviving statutory beneficiary for the
wrongful death of KENNETH POLLARD,

Plaintiffs,

v.

GLAXOSMITHKLINE, a Pennsylvania
corporation; MCKESSON
CORPORATION, a California Corporation;
and DOES 1-50,

Defendants.

Case No.

**DECLARATION OF GREG YONKO IN
SUPPORT OF NOTICE OF REMOVAL
AND REMOVAL ACTION, UNDER 28
U.S.C. § 1441(B) (DIVERSITY) and 28
U.S.C. § 1441(C) (FEDERAL
QUESTION) OF DEFENDANT
SMITHKLINE BEECHAM
CORPORATION dba
GLAXOSMITHKLINE**

I, GREG YONKO, declare:

1. I am Senior Vice President - Purchasing for McKesson Corporation
("McKesson"), and make this declaration in support of the Notice of Removal and
Removal Action of defendant SmithKline Beecham Corporation dba GlaxoSmithKline

Case 2:08-at-00278 Document 3-3 Filed 03/10/2008 Page 21 of 21

1 ("GSK") based on my personal knowledge.

2 2. I have been in my current position since 1997, and have been employed by
3 McKesson for over 25 years. As Vice President of Purchasing, I am responsible for
4 purchasing prescription and non-prescription branded product management and
5 investment purchasing.

6 3. McKesson was and is a Delaware corporation, with its principal place of
7 business in San Francisco, California.

8 4. McKesson was served with the Summons and Complaint in this action on
9 February 11, 2008.

10 5. McKesson consents to the removal of this action.

11 6. McKesson is a wholesale distributor of pharmaceuticals, over-the-counter
12 and health and beauty products to chains, independent pharmacy customers and hospitals.
13 As a wholesale distributor, McKesson distributes products manufactured by others. As to
14 Avandia®, McKesson does not manufacture, produce, process, test, encapsulate, label, or
15 package, these products, nor does it make any representations or warranties as to the
16 product's safety or efficacy.

17 7. McKesson distributed Avandia®, manufactured by GSK, along with many
18 other products of other pharmaceutical companies, to certain drug stores, pharmacies,
19 health care facilities and hospitals throughout the United States. As stated above,
20 McKesson did not manufacture, produce, process, test, encapsulate, label, or package
21 Avandia®, but only delivered the unopened boxes that contained the drug.

22 8. McKesson is one of many suppliers who could have supplied Avandia® to
23 the numerous pharmacies throughout the United States.

24 I declare under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct, and this declaration was executed on March 5, 2008 in
26 San Francisco, California.

27
28 
GREG YONKO